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No. 580, 581, 582

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IN THE

Supreme Court of the United States

October Term, 1933

ELIAS A. OLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, *Petitioner*,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' REPLY BRIEF.

Petitioners respectfully request the Court's permission to file the following Reply Brief.

Respondent's Briefs follow very closely the reasoning and authorities employed and relied on in the majority decision of the Circuit Court of Appeals. Accordingly, if Petitioners' Brief is reasonably accu-

rate and sound in its statement of the facts and the law and in its analysis of the majority decision, it will serve as a reply to most of Respondent's arguments.

Some further discussion of a few fundamental propositions may prove helpful:

I. The nature of the evidence excluded and the purpose for which it was offered are of controlling importance, and appear to be misunderstood by both Respondents.

The Brief for the United States (ft. p. 31) states: "The only question in the courts below was the measure and amount of compensation payable to the petitioners upon the taking." And again on page 32, "—And neither thought the value of the reservoir should be divided up among them."

Respondent's Briefs contain other statements which indicate that it is Respondent's understanding that Petitioners claimed something in addition to the fair market value of their land. Such is not the fact.

Petitioners make no claim to any part of the value of the completed reservoir. They make no claim for anything above the fair market value of their lands, determined in the way market value of land is always determined, by a consideration of the use and adaptability of the land, and of all factors, favorable and unfavorable, which are shown to have affected market values.

Respondent's are in error when they state that "the only question in the courts below was the measure and amount of compensation." The question was, what evidence should be considered by the jury in determining the "amount" of compensation. (See the court's instructions to the jury R. 130.) Much of Respondent's argument falls short of the point, it is respect-

fully suggested, because they mistook Petitioners' claim, and the purpose for which the excluded evidence was offered. This is notably true of Respondent's discussion of the effect of the past flooding of petitioners' lands, and petitioners' right to collect compensation therefor.

The dissenting opinion states:

> "It should be kept clearly in mind that the testimony sought to be introduced,—but excluded, was not offered for the purpose of obtaining past damages for past trespass, but solely for the purpose of establishing an existing and established element of value in the land, to be considered by the jury in fixing the compensation for the acquirement of a flowage easement for the future; and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken."

II. Many pages of Respondents Briefs are devoted to proving that it would not be possible for any persons or corporation to create and operate the Lake of The Woods Storage Reservoir without the consent and cooperation of the several governments involved.

The reasons advanced are numerous, but Petitioners have never disputed them nor the ultimate conclusion that governmental sanction and cooperation must be had.

However, Respondents have stated no reason and cited no authority which would eliminate special adapt-

ability and actual use from consideration merely because the permission and cooperation of the governments are necessary. We venture the assertion that no such reason or authority exists.

In such a case two considerations are controlling: (a) Are the permission and cooperation of the government or governments so likely to be forthcoming that business men would be reasonably justified in relying thereon, and that market values would be affected thereby? (b) Does the property in question, because of its character or location, possess inherent adaptability for a special use, or is its adaptability created by the consent and cooperation of the governments?

If governmental consent and cooperation are reasonably probable, and if the property possesses inherent adaptability independently of governmental action, then the fact that governmental consent and cooperation must be had in order to put the special adaptability to work will not exclude the special adaptability and actual use from consideration in determining market value.

The fact that action must be had by a government or by a number of governments is no different than necessary action by one or more persons or corporations. There is nothing about governmental permission and cooperation that gives a different rule of law than applies to permission and cooperation by private parties, except as to the probability that the necessary action will be forthcoming. It is the *probability* that the necessary cooperation to put the adaptability to work, will be given that is controlling, rather than who is to furnish the cooperation.

Suppose A and B own the dam site and all but 10 acres of the riparian lands which C owns. Could A and B exclude the special adaptability of C's land

from consideration in determining its market value, because it would be impossible to use C's special adaptability without the consent and cooperation of A and B? If A and B are governments the rule is the same. (Petitioners' Brief, pp. 92-100)

It will not be disputed that petitioners' lands possess special adaptability which is inherent and not created by governmental action. In fact it is the inherent adaptability and value of these shorelands which caused all of the governmental activity. Nor can it be denied, on the record before the Court, that this special adaptability and actual use actually affected market values.

It remains then only to determine whether the consent and cooperation of the governments in question were so likely to be granted that business men would be reasonably justified in acting thereon.

The facts are undisputed on the record that all parties, including the governments, Indian tribes, and private owners have consented and cooperated for 30 years. Canada and the United States through their International Joint Commission gave every indication of desiring to legalize the use which had been made and the cooperation which had existed for 30 years. Respondents' Briefs clearly show that the interests of both countries, including navigation, required such governmental consent and cooperation. There is every reason why such consent and cooperation should be granted, and no reason has been suggested by any one why it should not be granted. Probably the surest proof that businessmen were justified in relying on such consent and cooperation is the fact that Canadian business men invested many millions in reliance thereon.

Surely no one will seriously claim that there has been the slightest doubt at any time during the past 25 years that the governments, including the Indian tribes, would give such consent and cooperation as would permit the special adaptability of petitioners' and other's lands to be lawfully used for the creation of wealth and the service of mankind.

Such being the undisputed facts, the special adaptability and use of the lands for such purpose must be considered in determining their market value, and the fact that governmental cooperation and consent are necessary make not the slightest difference, on the record before the Court.

III. Respondents urge that because the Lake is international in character and because, in the past, its levels have been regulated by Canada and, in the future, will be regulated by Canada and the United States, it would be impossible for any private person or corporation to control the storage reservoir, and consequently the market value of the shorelands could not possibly be affected by their special adaptability or actual use for storage purposes.

Respondents' contention is unsound in several respects.

1. Government supervision and control over the use of property possessing special adaptability does not eliminate such special adaptability from consideration in determining the market value of the property.

2. Complications which might arise due to the international character of the lake might detract from the value of the special adaptability of the lands, but it could not, as a matter of law, completely eliminate such special adaptability from consideration. As stated in the dissenting opinion, all of the facts and

circumstances should be submitted to the jury under proper instructions.

3. The fact that, at the time of taking, there was no taker except the government, and that at no time could the shorelands have been used for storage purposes without government consent and strict supervision and control, does not, as a matter of law, eliminate special adaptability and actual use from consideration in determining market value.

The three foregoing propositions are elemental. No authority to the contrary is cited by Respondents. Two decisions of this Court illustrate the general rule:

Monongahela Navigation Co. v. U. S. 148 U. S. 312.
U. S. v. Chandler-Dunbar Co., 229 U. S. 53.

In the Monongahela case the United States was acquiring a lock and dam built by the company in the navigable waters of the Monongahela River. The principal question was whether the government must pay for the use value of the lock and dam represented by the value of its franchise to take tolls from those who used them. The Court held that the value to the owner of the use made of its property must be paid.

The Monongahela River being navigable and an interstate boundary, the construction and use of the dam and lock were obviously subject to regulation and control by the two states and by the Federal Government. Likewise, under the circumstances, the Federal Government was the only possible taker. These facts however did not exclude from consideration, in fixing just compensation, the use which the property served at and prior to the time of taking, and the value of such use to the owner!

Likewise, in the Chandler-Dunbar case, the strip of land taken lay between the ship canal owned by the United States, and the St. Marys River, an international boundary navigable stream. The strip of land was especially adapted for canal purposes. Obviously such canal, if and when built, would be subject to the minutest regulation and control by both governments, just as are the waters of the Lake of the Woods. Probably no one except the United States or Canada would ever consider constructing a canal and locks on that property in view of all the existing circumstances. The owner of the land had derived no income from it on account of its special adaptability for lock and canal purposes. At the time of taking, the United States was the only possible taker, just as claimed by Respondents in the instant case.

Yet this Court required the United States to pay the fair market value of the strip of land, in view of and giving consideration to its special adaptability for lock and canal purposes. (See p. 82 Appellants' Brief.)

4. The foregoing considerations demonstrate that Respondents' contentions are unsound as a matter of law, they are also unsound and erroneous on the facts.

It has already been demonstrated that for more than twelve years before these proceedings were begun Petitioners could have sold their lands for higher prices because of their special adaptability and actual use for reservoir purposes; that similar lands were actually bought and sold for higher prices on that account, that reservations of these flowage rights were made in instruments of conveyance, and that these increased market values were a benefit and of value to Petitioners. (See Appellants' Brief, pp. 28-42.)

On these established facts, and in view of the decisions of this Court, Respondents may not, without dis-

regarding the facts and the law, contend that it was impossible for the special adaptability and actual use of Petitioners' lands to affect market values. The values were in fact affected.

IV. Respondents next insist that the higher market values which were paid for these shorelands, on account of their special adaptability and use, should be entirely disregarded, for the alleged reason that such values grew out of the human impulse to speculate, and in anticipation that some day the Government might acquire the lands.

This contention likewise is unavailing to Respondents:

1. Higher market values were paid for these lands before the report of the International Joint Commission was published. No one, at that time knew what the report would be, nor that it would be the government that would acquire the lands. (See Petitioners' Brief, p. 32.)

2. The value of these shorelands for reservoir purposes, and the great value of the reservoir, were such that it was a certainty that the reservoir would be perpetuated. It was a certainty that some entity would acquire the shorelands, the reservoir could not exist, lawfully, without them. The reservoir which had been used for 30 years, and on the anticipation of the continued use of which millions had been invested by Canadian enterprise, and the value of which according to Judge Rockwood, Counsel for Minnesota and Ontario Power Company, represented, to the power companies alone, interest at 5 per cent on $23,000,000.00, would never be abandoned. In addition to these great values Respondents have called attention to the contribution which the reservoir made to navigation, and

the interest displayed by both governments in the continued existence and control of the reservoir. Because of the certainty that the reservoir would be continued, both governments withdrew their public lands from entry, though the United States did not withdraw its lands until it had patented several thousand acres to settlers in addition to the acreage reported by the International Joint Commission. Probably few if any investments are further removed from speculation than was the certainty that Petitioners' lands possessed inherent adaptability for a special use, that such use was very valuable, and that both the use and the value was certain to continue. Surely, on these facts, the increased market value of these lands for more than twelve years before their taking in these proceedings, should not be disregarded because of speculation and uncertainty. An existing continuing market value is not disregarded because based in part on anticipated future development, apparently certain.

3. Market Value is to be determined as of the date of filing the award of the Commissioners in the condemnation proceedings. In this instance it would be in 1929. It follows that market values which prevailed from 1916 to 1929, and the facts and circumstances upon which such values are based must be taken into consideration in determining the market value in 1929. It will not do to say, that such market values are in anticipation of the taking, and so must be disregarded, for every increase in value resulting from special adaptability must occur because it is anticipated that some day the property will be taken and used for the purpose for which it is especially adapted. If it were not so anticipated, market value could not be affected by the special adaptability. If increased market value based upon special adaptability which it is reasonable

to anticipate will some day be taken and used must be excluded, as Respondents claim, and if special adaptability, which has not affected the market value, must be disregarded, because it is speculative and uncertain, it would follow that special adaptability could never be considered in determining market value. It is probably for this reason that the date of filing the award has been adopted as the dividing line, and any fact or circumstance affecting market value prior to that date, and which is not contributed by the taker must be considered.

> "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.*" U. S. v. Chandler-Dunbar Co., *supra.*

V. Respondents stress the fact that the reservoir is not used exclusively for the development of power, and that navigation and other interests benefited therefrom.

That fact is not disputed. But it does not detract from Petitioners' rights nor justify the majority decision. It is special adaptability and actual use for *Reservoir purposes* which Petitioners' lands possess, and it was such special adaptability and use which Petitioners sought to prove, but were denied. It is not material for what purpose the reservoir is used. If it were used exclusively for navigation purposes, and if the United States alone were interested, the majority decision of the Circuit Court of Appeals would be equally erroneous.

> Monongahela Navigation Co. v. U. S., *supra.*
> U. S. v. Chandler-Dunbar Co., *supra.*

VI. As to Petitioners' Rights under the Treaties of 1909, and 1925, and the effect of the construction placed upon the treaty of 1909 by the majority decision of the Circuit Court of Appeals.

If we correctly understand Respondents' position relative to Petitioners' rights under the Treaty of 1909, it is:

1. That Petitioners had no rights whatever to recover for the past flooding and use of their lands, either under the Treaty or under general law;

2. That even if they had any rights, such rights are not available to Petitioners because being based on foreign law, such law must be pleaded and proved, and that was not done.

3. In any event, neither the past use of Petitioners' lands nor their right to recover for such use is material in proving the fair market value of Petitioners' lands.

4. That if Petitioners had any right to recover for the flooding and use of their land such right has been lost by more than twenty years adverse user.

As a starting point in considering Respondents' position, it will be helpful to begin with Section IV of the Treaty of 1909. This section provides that:

> "The High Contracting Parties agree that, except in cases provided for by Special Agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstruction in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission."

This section of the treaty clearly amounts to an Agreement by the Canadian Government that it would not permit the *Maintenance* of the Norman Dam in such a way as "to raise the natural level of waters on the other side of the boundary."

Respondents suggest the possibility of a "special agreement" in the fact that the International Joint Commission reports that in 1905, the Government of the United States "suggested" to the Dominion Government that the Norman Dam be so operated as to prevent the lake level from falling below elevation 1,060.8.

Obviously such a "suggestion", not complied with could not amount to a "Special Agreement." The Commission expressly reports that "the Canadian Government concluded that the request of the United States Government could not be granted" without injury to important industries in Canada. (Final Report D. J. C., ft. p. 18.)

That there was no "special agreement" permitting the maintenance of the Norman Dam is further shown by the statement of the International Joint Commission that during the period following the construction of the Norman Dam and the consequent use of the boundary waters "such use gave rise to serious differences between the people of the two countries, and was also the subject of diplomatic correspondence between the Governments." (Final Report I. J. C., mid. p. 85.)

Likewise the reference of the dispute to the International Joint Commission does not indicate a prior "Special Agreement" permitting the maintenance of the dam.

The next question is did the violation of Article IV of the treaty and the consequent use of Petitioners'

lands for reservoir purposes give Petitioners any right to recover for the use thus made of their lands.

The Proclamation accompanying the treaty states that the high Contracting Parties have entered into the treaty, "being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise."

It will be remembered that the use of Petitioners' lands, and others, was then a pending question.

Rights Under the Treaty of 1909

It is Petitioners' belief and claim that the violation of Article IV of the Treaty gave them a right to recover for the unlawful use of their land, either under Article II of the treaty or under general law. (See Petitioners' Brief, pp. 43-52, inc.)

Respondents' suggested construction of the right of action granted by Article II limiting it to rivers which flow across the boundary is unnecessarily restricted, and is contrary to the express purpose of the treaty which was to "settle all questions which are now pending." No reason has been suggested for giving a right of recovery for obstruction to such rivers, and giving no such right for interference with boundary waters.

Furthermore, if the limited construction Respondents suggest be placed upon the treaty, private parties are left with no direct means of redress. There is no provision whereby a private party may submit his

grievance to the Commission. Only the respective governments may refer questions to the Commission. Such a construction places an unnecessary burden upon the diplomatic service and upon the Commission. And especially does it deny the residents of each country the right under the treaty to have their grievances redressed in a duly constituted court of law or equity, which is the cherished right of all English speaking peoples.

Furthermore the treaty expressly provides that the Commission shall "report" on other matters referred to it but that "Such reports * * * shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award." (Article IX, Treaty of 1909.) Obviously the private claimant is left without adequate means of redress under the treaty, if the narrow construction of Article II is adopted.

It is significant that in its report on this very reference the International Joint Commission did not undertake to redress the landowners' grievances for the past unlawful use of their lands. It required another treaty, the treaty of 1925 to give redress for the past flooding of these lands.

It is respectfully suggested that a broad construction of Article II of the treaty is in the best interest of both governments and of their respective inhabitants, for the treaty applies generally to all boundary waters.

Rights Under General Law

It is Petitioners' belief and claim that, on the peculiar facts applicable to the Lake of the Woods claims, the owners of the flooded American shorelands have a cause of action in the Canadian Courts under

general law and without relying on Section II of the treaty.

We respectfully submit that the record proves that the Canadian Government has violated its contractual obligation, contained in Article IV of the treaty, not to "permit" the maintenance of dams in boundary waters which will raise the natural level of such waters. By so doing the Canadian Government has occupied and used Petitioners lands, and the other shorelands, for its own purposes and for the purposes of its residents and industries. We must therefore squarely dissent from the statement relied upon as the foundation for the very learned and exhaustive argument contained in the Brief of the Government of Canada, on page 129, where it is written:

> "There is no suggestion in the record of any contract on which the Crown could be sued. There is no suggestion that the Crown had taken possession of the landowners lands—"

It is respectfully submitted that the Treaty was a contract not only for the benefit of the High Contracting Parties but also for the benefit of their respective inhabitants. The Canadian and English cases recognize that a breach of a contractual agreement gives rise to a cause of action in a foreign jurisdiction, although no such right exists for a tort.

Yates v. The King, 20 Ex. C. R. 175.

No criticism is intended of the friendly Government of Canada by the statement that it violated Article IV of the treaty. It is universally conceded that no Government excels the Government of Canada in its observance of National honor and treaty obligations. Its sense of equity and justice is equally noteworthy and

generally recognized. Indeed it may be said that more serious complaint was not made by petitioners against the unlawful use of their lands because it was recognized that the temporary violation of the treaty enabled these shorelands to be devoted to their most profitable and best adapted use and because it was commonly understood on both sides of the boundary, that just compensation ultimately would be paid for such use; and to that end provision was made in the treaty of 1925.

But we are now dealing with a question of technical rights, rights which must be redressed, for otherwise, as stated by Judge Booth, "it would be a reproach to both Governments concerned." (R. 433) The Government of Canada in the treaty of 1925 justly conceeded petitioners rights arising from the past flooding of their lands. By the same treaty both Governments necessarily conceded that a wrong had been done upon which Petitioners conceded rights were based.

Petitioners do not claim a right, recoverable only under some unusual provision of the Canadian law. If such were the case, the foreign law would need to be pleaded and proved, as claimed for Respondent. But here it is not necessary to put the foreign law in evidence because Petitioners' rights are not conditioned upon it. They are based upon the treaties of 1909 and 1925 which are in evidence, and upon general law which is the same in both countries. It is only where foreign law is claimed to be different that it is necessary to prove it, otherwise it will be presumed to be the same as the law in this country. The burden is on Respondent to prove that the Canadian law differs from the general law as stated and applied by this Court.

It is respectfully urged that because Petitioners rights are conceded, and spring from the breach of treaty obligation, and because on the facts in this rec-

ord an action for trespass will lie on the authorities cited in Petitioners Brief pp. 48-52, and because Petitioners' lands were occupied and used by the Government of Canada, Petitioners had a cause of action enforceable in the Courts of Canada, as well as by Petition of Right.

As to the Materiality of Petitioners' rights, due to the past unlawful use of their land, in Estimating Market Value.

It appears to be well settled that the unauthorized use of Petitioners' lands gave Petitioners the right to be paid fair compensation for such use.

Utah Power & Light Co. v. U. S., 243 U. S. 389.
Pacific Gas & Electric Co. v. U. S., 45 F. (2d) 708.
U. S. v. Bernard, 202 Fed. 728.
Wolfe v. Mayer Bros., 171 Minn. 98, 213 N. W. 549.
Weaver v. Miss. and Rum River Boom Co., 28 Minn. 534, 11 N. W. 113, 28 Minn. 542, 11 N. W. 114.
Sutherland on Damages, Vol. 4, p. 3746, Sec. 1014.

It is equally well settled that the consideration payable for the use of property must be considered and paid for in estimating and paying just compensation.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 328.

"The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. *For each separate use of ones property by others, the owner is entitled to a reasonable compensation;* and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its

value. So that *if this property, belonging to the Monongahela Company, is rightfully where it is; the company may justly demand from every one making use of it a compensation;* and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive." (Italics supplied by counsel)

Accord

Northern Pacific Ry. Co. v. North American Telegraph Co., 230 Fed. 347 (C. C. A. 8th).

Obviously the amount paid is not controlling in the application of the principle. That Petitioners and other shoreland owners are entitled to some compensation for the flooding of their lands is conceded by the Treaty of 1925, and the acts of Congress giving effect thereto.

It is respectfully submitted that, on the established facts and the decisions of this Court, Petitioners' right to collect compensation for the past flooding of their lands, and the fact of the use which their lands had actually served for the past 30 years should have been considered in determining their market value.

The claim on behalf of Respondent that Petitioners' rights are barred by adverse user is untenable for the reason that such past user has never been under any claim of right or of ownership. It has never been hostile to Petitioners' right or title, and never claimed to exclude Petitioners therefrom. It has not been continuous but has been interrupted by years of low water. (R. 213) All of which are fatal to the claim of adverse user under Minnesota law which must control in such matter. Furthermore any such claim is expressly negatived by the Treaty of 1925 where Petitioners' undiminished rights are recognized.

VII. It is suggested that Respondent may have some right paramount to Petitioners by reason of the Indian Appropriation Acts. (Brief for U. S. pp. 27, 28) It is respectfully submitted that this question is not before the Court. The Rights of the United States under the Indian Acts were litigated and decided adversely to Respondent in

U. S. v. Wheeler Township, 66 F. (2d) 977.

No action was taken to review the decision, consequently, on the record and briefs before the Court in these proceedings, questions arising under the Indian Acts are not available to Respondent.

CONCLUSION.

Petitioners respectfully urge for the Court's consideration the conclusions submitted in their original brief, and for the reasons discussed in said brief.

Each of the points on which Petitioners' prayer for a new trial is based is independent of the other points. If the Court shall find that Petitioners' claim as to any one, or more, of said points is valid, then Petitioners' prayer should be granted.

Respectfully submitted,

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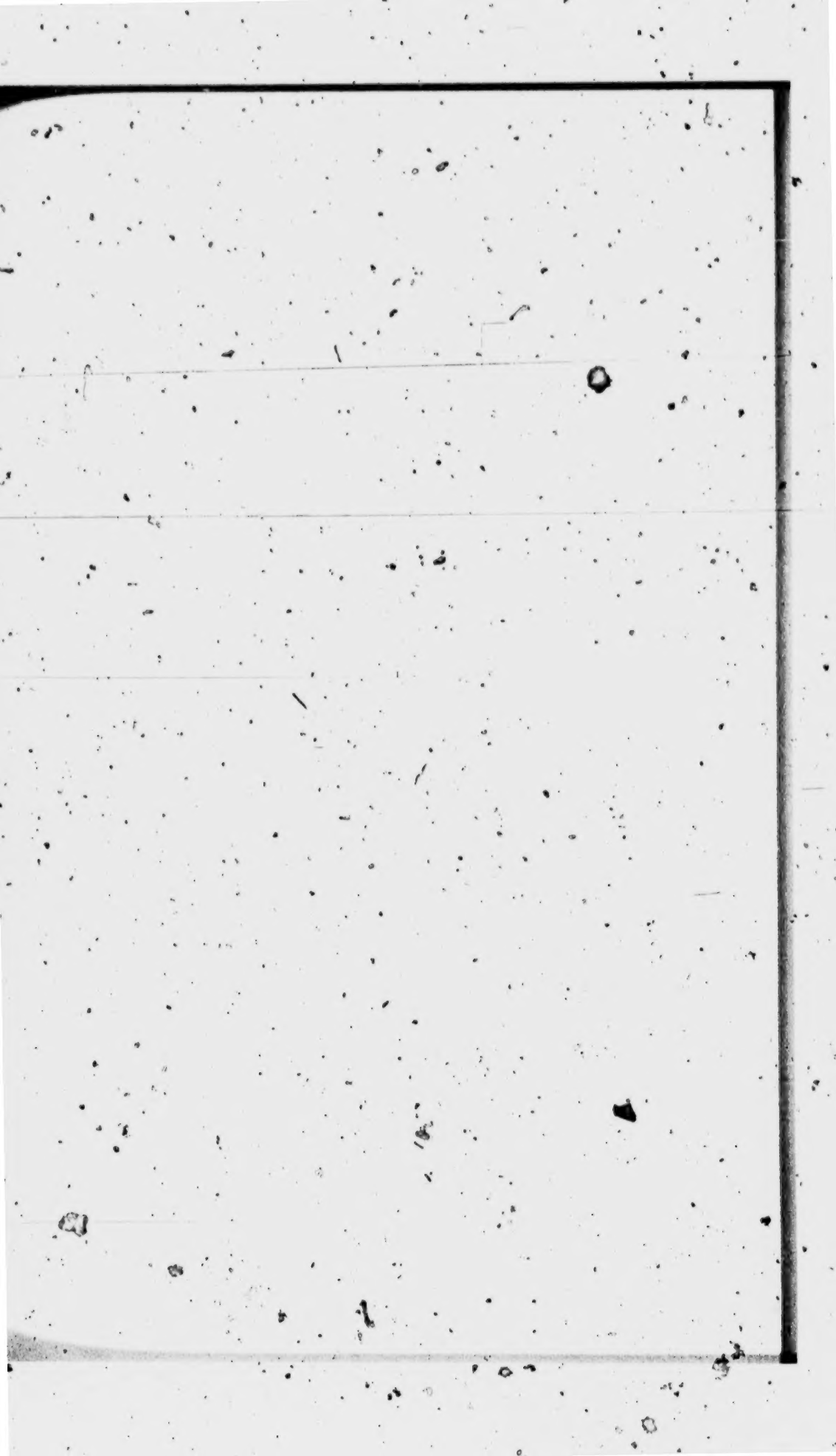

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 580

ELIAS A. OLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 581

RANDOR G. KARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 582

HARRY BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court.[1] The charge to the jury appears at R. page 126.

[1] In November 1929, ten Lake of the Woods cases were tried before District Judges Cant and Sanborn, who filed a

The opinion of the Circuit Court of Appeals appears at R. 417–429. The dissenting opinion is at R. 429–439. The opinions are reported in 67 F. (2d) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 21, 1933 (R. 439–440). The petition for certiorari was filed November 10, 1933. Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The question presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various

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decision and supporting memorandum in October 1930, in which they held that reservoir adaptability had no influence upon the market value of the lands condemned either in fact or in law. This decision is not reported. It is filed in the office of the Clerk of the United States District Court for Minnesota at Duluth, *sub nom. United States of America* v. *Various Tracts of Land in Roseau and Lake of the Woods Counties*, Appeal of Alfred M. Lawson et al., Law 539 (1549).

Thereafter the same issue was presented in the instant cases before Judge Sanborn, sitting with a jury. The cases therein passed on are companion cases to the present ones. An appeal was taken from the judgment of Judges Cant and Sanborn. Such appeal has been kept in abeyance pending the decision in the present cases.

> ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

If the evidence was rightly excluded no complaint could be made with reference to the charge. The question presented therefore is essentially this: Was testimony of potential utility of petitioners' tracts of land to water power development admissible as evidence of its value under the circumstances of this case?

TREATIES AND STATUTES INVOLVED

> Treaty of 1925 between the United States and Great Britain in respect to Canada, 44 Stat. Pt. 3, p. 2108;
>
> Treaty of 1909 between the United States and Great Britain with respect to Canada, 36 Stat. Pt. 2, p. 2448;
>
> Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of the treaties and statutes as amended are set forth in the appendix to petitioners' brief.

STATEMENT

This is a proceeding instituted by the United States under the provisions of the Lake of the Woods Act (May 22, 1926), c. 364, 44 Stat. 617,